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PWC Corp Sdn Bhd v Teknologi Duta Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCVC-232–07 OF 2012
YEOH WEE SIAM J
9 MAY 2014

Contract — Agreement — Breach — Parties entered into subcontract agreement — Allegation of breach of contract — Failure to approve progressive claims for works done — Failure to pay amount due within prescribed time under contract — Failure of subcontractor to complete building structure — Allegation that subcontractor breached and/or repudiated contract — Counterclaim for losses by subcontractor — Whether main contractor or subcontractor breached contract — Whether either party entitled to claim

The defendant was the main contractor for a project ('the project') for Dewan Bandaraya Kuala Lumpur ('DBKL') and had appointed the plaintiff to act as the subcontractor. However, the plaintiff contended that the defendant had breached the contract by failing to approve the progressive claims for work done by the plaintiff and to pay the amount due within the same prescribed time under the contract; by failing to complete the building structure and to provide possession of the project site to the plaintiff within the prescribed time under the contract and the defendant obstructed, prevented and/or hindered the plaintiff from carrying out the whole of the remaining works under the contract; and unilaterally and without any reasons, considering the contract null and void and refusing to pay the plaintiff for works done under the contract until and unless the plaintiff agreed to the new terms and conditions. On the other hand, the defendant alleged that the plaintiff had stopped work at the project site and pressurised the defendant to draft a new LOA based on a new increased contract sum of RM2,914,118. However, the plaintiff refused to execute the new LOA and abandoned the works at the project site. The defendant had not choice but to appoint a third party ('NL Aluminium') to complete the works abandoned by the plaintiff. In the present claim, the plaintiff alleged that the defendant had breached and/or repudiated the contract and as a result, the plaintiff suffered losses and damages. The defendant counterclaimed for, inter alia, special and general damages and for loss of profits and late interest. The issue that arose for the court's determination were whether it was the plaintiff or the defendant that had breached the contract; and whether either party was entitled to its claim.

Held, dismissing the claim and the counterclaim with costs of RM15,000:

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(1) There is no documentary evidence to show that the defendant, through its correspondence, had communicated to the plaintiff in writing that it was withholding payment for works done because the plaintiff's works were incomplete or the plaintiff submitted its progress claims prematurely (see para 18).

(2) Until the civil suit was filed, there was no proof of payment by the defendant to the plaintiff. The defendant was liable to pay the plaintiff the sum of RM35,966 pursuant to the plaintiff's progress claims. However, since the plaintiff failed to submit the performance bond, the defendant was entitled to retain and deduct this sum from the full sum of the performance bond until such time when the plaintiff submitted the performance bond. In this case, the plaintiff did not submit the performance bond at all. Therefore, the defendant was allowed to retain and deduct the sum of RM35,966. The effect of that finding was that the plaintiff was not allowed to claim that sum (see para 19).

(3) The plaintiff was dissatisfied with the terms of the new LOA since it included new terms and conditions in the subcontract agreement which the plaintiff thought was unfavorable to it. The plaintiff therefore did not execute the new LOA with the defendant. Without the execution of the new LOA, it means that parties would still be bound by the existing contract/the original LOA. However, the plaintiff chose not to continue with the works that it had contracted for with the defendant under the existing contract. The plaintiff did not fulfill most of its obligations under the contract. It was clear that the plaintiff, by abandoning the works under the contract with the defendant, had breached the contract (see paras 30–31).

(4) There was no cogent proof adduced by the defendant that the plaintiff demanded to be given exclusive possession of the project site. Therefore, this allegation by the defendant against the plaintiff was baseless. Based on the contract, the plaintiff was 'required' to work in close coordination with other trade subcontractors and allow for the commencement of works for these trades if required and to facilitate the sequence of work by other trade subcontractors (see para 62).

(5) The plaintiff failed to prove that the defendant did not give the plaintiff possession of the site within the prescribed time under the contract. Neither did the plaintiff succeed in proving its claim that the defendant obstructed, prevented and/or hindered the plaintiff from carrying out the whole of the remaining works under the contract (see para 63).

(6) While the defendant had failed to supply the plaintiff with the requisite master work program, which was in breach of the defendant's obligations under the contract, the plaintiff was even more blameworthy for abandoning the works and the contract, and leaving the defendant in the

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lurch. In view of the defendant's breach of the contract by failing to provide the master work program and for including new and unfavorable terms to the new LOA and subcontract agreement which made it impossible for the plaintiff to carry on with the works, the defendant was not entitled to its counterclaim (see para 64).

[Bahasa Malaysia summary

Defendan adalah kontraktor utama untuk projek ('projek') bagi Dewan Bandaraya Kuala Lumpur ('DBKL) dan telah melantik plaintif untuk bertindak sebagai subkontraktor. Walaubagaimanapun, plaintif mendakwa bahawa defendan telah memungkiri kontrak kerana gagal untuk meluluskan tuntutan progresif bagi kerja yang dilakukan oleh plaintif dan membayar amaun yang kena dibayar dalam masa yang sama yang ditetapkan di bawah kontrak; kerana gagal untuk menyiapkan struktur bangunan dan menyediakan tapak projek itu kepada plaintif dalam tempoh yang ditetapkan di bawah kontrak dan defendan menghalang, mencegah dan/atau mengganggu plaintif daripada menjalankan keseluruhan kerja-kerja yang masih di bawah kontrak itu; dan secara unilateral dan tanpa apa-apa sebab, mempertimbangkan kontrak itu batal dan tidak sah dan enggan membayar plaintif untuk kerja-kerja yang dilakukan di bawah kontrak sehingga dan melainkan jika plaintif bersetuju dengan terma-terma dan syarat-syarat yang baru. Sebaliknya, defendan mendakwa bahawa plaintif telah berhenti kerja di tapak projek dan memaksa defendan untuk mendraf satu surat penerimaan ('SP') baru berdasarkan peningkatan jumlah kontrak baru RM2,914,118. Walaubagaimanapun, plaintif enggan untuk menyempurnakan SP baru dan meninggalkan kerja-kerja di tapak projek. Defendan tidak mempunyai pilihan tetapi untuk melantik pihak ketiga ('NL Aluminium') untuk menyelesaikan kerja-kerja yang ditinggalkan oleh plaintif. Dalam tuntutan ini, plaintif mendakwa defendan telah memungkiri dan/atau membatalkan kontrak dan akibatnya, plaintif mengalami kerugian dan kerosakan. Tuntutan balas defendan untuk, antara lain, ganti rugi khas dan am dan bagi kehilangan keuntungan dan faedah lewat tempoh. Isu yang timbul untuk penentuan mahkamah adalah sama ada plaintif atau defendan yang telah memungkiri kontrak; dan sama ada mana-mana pihak berhak untuk tuntutannya.

Diputuskan, menolak tuntutan dan tuntutan balas dengan kos sebanyak RM15,000:

(1) Tiada keterangan dokumentar yang menunjukkan bahawa defendan, melalui surat-menyuratnya, telah menyampaikan kepada plaintif secara bertulis bahawa ia menahan bayaran untuk kerja-kerja dilakukan kerana kerja-kerja plaintif tidak siap atau plaintif menyerahkan tuntutan bayaran kemajuan sebelum masanya (lihat perenggan 18).

(2) Sehingga saman sivil difailkan, tiada bukti pembayaran oleh defendan kepada plaintif. Defendan bertanggungjawab untuk membayar plaintif

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jumlah RM35,966 menurut tuntutan bayaran kemajuan plaintif. Walau bagaimanapun, kerana plaintif gagal mengemukakan bon prestasi, defendan berhak untuk mengekal dan memotong jumlah ini daripada jumlah penuh bon prestasi sehingga masa apabila plaintif mengemukakan bon prestasi. Dalam kes ini, plaintif langsung tidak mengemukakan bon pelaksanaan. Oleh itu, defendan telah dibenarkan untuk menahan dan menolak jumlah RM35,966. Kesan daripada dapatan itu adalah bahawa plaintif telah tidak dibenarkan untuk menuntut jumlah tersebut (lihat perenggan 19).

(3) Plaintif tidak berpuas hati dengan syarat-syarat SP baru kerana ia termasuk terma-terma dan syarat-syarat yang baru dalam perjanjian subkontrak yang difikirkan plaintif tidak menguntungkannya. Plaintif oleh itu tidak menyempurnakan SP baru dengan defendan. Tanpa pelaksanaan SP baru ini, ia bermakna bahawa pihak-pihak masih terikat dengan kontrak/SP asal yang sedia ada. Walaubagaimanapun, plaintif memilih untuk tidak meneruskan kerja-kerja yang dikontrakkan dengan defendan di bawah kontrak yang sedia ada. Plaintif tidak memenuhi kebanyakan tanggungjawabnya di bawah kontrak. Adalah jelas bahawa plaintif, dengan meninggalkan kerja-kerja di bawah kontrak dengan defendan, telah memungkiri kontrak (lihat perenggan 30–31).

(4) Tidak terdapat bukti meyakinkan dikemukakan oleh defendan bahawa plaintif menuntut untuk diberikan hak eksklusif kepada tapak projek tersebut. Oleh itu, dakwaan oleh defendan terhadap plaintif adalah tidak berasas. Berdasarkan kontrak, plaintif telah 'required' untuk bekerja dalam koordinasi yang rapat dengan lain-lain subkontraktor perdagangan dan membenarkankan untuk memulakan kerja bagi dagangan ini jika diperlukan dan untuk memudahkan urutan kerja oleh subkontraktor perdagangan yang lain (lihat perenggan 62).

(5) Plaintif gagal membuktikan bahawa defendan tidak memberikan plaintif milikan tapak dalam masa yang ditetapkan di bawah kontrak. Tidak juga plaintif berjaya membuktikan tuntutannya bahawa defendan menghalang, mencegah dan/atau mengganggu plaintif daripada menjalankan keseluruhan kerja-kerja yang masih di bawah kontrak (lihat perenggan 63).

(6) Walaupun defendan gagal menyediakan plaintif program kerja induk yang diperlukan, yang mana melanggar kewajipan defendan di bawah kontrak itu, plaintif adalah lebih patut dikecam untuk meninggalkan kerja dan kontrak, dan meninggalkan defendan dalam kesusahan. Dalam mempertimbangkan kemungkiran kontrak oleh defendan dengan kegagalan untuk menyediakan program kerja induk dan memasukkan terma baru dan tidak menguntungkan di dalam SP baru dan perjanjian subkontrak yang menjadikan mustahil bagi plaintif untuk meneruskan

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kerja-kerja, defendan tidak berhak kepada tuntutan balas (lihat perenggan 64).] A

Notes

For a case on breach, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2962. B

Cases referred to

Amanah Butler (M) Sdn Bhd v Yike Chee Wah [1997] 1 MLJ 750, CA (refd)
Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 5 MLJ 1, CA (refd)
Government of the State of Sabah v Suwiri Sdn Bhd [2006] 1 MLJ 359, CA (refd) C
Menah Sulong v Lim Soo & Anor [1983] CLJ (Rep) 263, FC (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd [2001] 1 MLJ 324, CA (refd) D

Legislation referred to

Contracts Act 1950 s 74

Shannon Rajan (Loshini Ramarmuty with him) (Skrine) for the plaintiff.
Lam Wai Tze (Rachel Suppiah with her) (Lam Wai Tze & Co) for the defendant. E

Yeoh Wee Siam J:

[1] The defendant is the main contractor for Dewan Bandaraya Kuala Lumpur ('DBKL') for a project known as 'Cadangan Membina Tingkat Bangunan Perdagangan yang Mengandungi 2 Tingkat Medan Selera, 8 Tingkat Tempat Letak Kereta, 3 Tingkat Ruang Pejabat, 1 Tingkat Pusat Rekreasi dan 1 Tingkat Mezzanin Ruang Kemudahan Di Atas PT 80, Plot A & B Dan Lot 302, Lorong Bunus 4, Seksyen 40, Kuala Lumpur' ('the project'). F G

[2] The defendant appointed the plaintiff as a subcontractor for the project for 'Supply, Delivery, Installation, Testing and Commissioning of Aluminium And Glazing Works (Includes Curtain Wall, Glass Panel, Windows And Fixed Panel And Screen Louvres)' for a sum of RM2,600,000 pursuant to a letter of award ('the original LOA' or 'the contract') dated 2 July 2010 (CBOD1 Pt A 1–10). H

[3] The plaintiff contended that the defendant breached the contract by: I

(a) failing to approve the progress claims No 1–3 for work done by the plaintiff, and pay the amount due on the same within the prescribed time under the contract;

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(b) failing to complete the building structure and to provide possession of the project site to the plaintiff within the prescribed time under the contract, and the defendant obstructed, prevented and/or hindered the plaintiff from carrying out the whole of the remaining works under the contract; and

(c) unilaterally and without any reasons whatsoever, considering the contract null and void, and refusing to pay the plaintiff for works done under the contract until and unless the plaintiff agreed to the new terms and conditions contained in the revised letter of acceptance dated 2 November 2011 (CBOD1 Pt A pp 43–51) ('the new LOA'), which shall replace the existing contract.

[4] On the other hand, the defendant alleged that since September 2010, the plaintiff had stopped work at the project site. The plaintiff pressurised the defendant, which was already under pressure from DBKL to complete the project, to draft the new LOA based on a new increased contract sum of RM2,914,118. However, subsequently the plaintiff refused to execute the new LOA and abandoned the works at the project site. Despite repeated reminders by the defendant, the plaintiff did not resume its works under the contract.

[5] Finally, the defendant had no choice but to appoint a third party, NL Aluminium Works Sdn Bhd ('NL Aluminium') to complete the works, which had been abandoned by the plaintiff, under a new contract dated 16 April 2012 for the contract sum of RM3,400,000 (see exh D3).

THE PLAINTIFF'S CLAIM

[6] By reason of the alleged breaches and/or repudiation of the contract by the defendant, the plaintiff has suffered and is claiming the following losses and damages:

(a) the sum of RM35,966 (including the retention sum) being the amount due and owing for works done by the plaintiff under the contract;

(b) the sum of RM520,000 for loss of anticipated profits;

(c) damages to be assessed for loss of opportunity in that the plaintiff was prevented from participating in tenders for various projects; and

(d) costs and interests or such other relief as the court deems fit and proper.

THE DEFENDANT'S COUNTERCLAIM

[7] The defendant's counterclaim against the plaintiff is for:

(a) special damages of RM800,000;

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(b) general damages to be assessed;

(c) interest at 4%pa from the date of filing of the statement of claim until the date of full realisation;

(d) costs; and

(e) any other relief which this honourable court deems just, proper and appropriate.

[8] As part of its counterclaim, the defendant is claiming for loss of profits (to be assessed), and late interest ('faedah lewat') that was imposed by DBKL.

ISSUE

[9] The main issue is whether it is the plaintiff or the defendant which has breached the contract, and whether either party is entitled to its claim.

THE LAW

[10] In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd* [2001] 1 MLJ 324 at p 339, the Court of Appeal laid down the following legal principles:

> I must say at once that in an action founded on contract, the issue as to which of the contracting parties is in breach is a question of fact that depends for its resolution upon the facts and circumstances of the particular case. If the contract is in writing, the first task of the court is to interpret the terms of the documents to ascertain its meaning in the context of determining the nature of the particular obligations the breach of which is complained. The next task is to determine on the peculiar facts of the particular case as to whether the breach complained of did occur. In the ordinary course of things, it is the pleaded case of each party that will identify the obligation that required performance, the act or conduct that is to said to constitute the breach of that obligation and (in the case of a defence), any justification proffered in support of the course of action complained of.

WHICH PARTY BREACHED THE CONTRACT

Whether the plaintiff submitted the performance bond, or whether it was required by the defendant

[11] The defendant contended that from the outset, it was the plaintiff who had breached the contract by its failure to submit the performance bond required under cl 9 which provides as follows:

> 9 Performance Bond
>
> 9.1 Within Thirty (30) days of signing this letter, you are required to submit a Performance Bond in the form of a Banker's Guarantee

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A equivalent to five (5) percent of Contract Sum amounting to RM 130,000.00 (Ringgit Malaysia: One Hundred and Thirty Thousand Only). The performance Bond shall remain in force until the Certificate of Making Good Defects is issued.

B 9.2 Should you fail to submit the Banker's Guarantee as stated, we shall retain and deduct the same full amount from any amount due or become due to you until such time that the Performance bond is submitted. In addition to that, a penalty at three (3) percent per annum of the value of Performance Bond or RM500.00 per month (whichever is higher) shall be deducted from this Contract until C such time that the Performance bond is submitted.

[12] Tai Terk Chuan (PW2), the executive director of the plaintiff, admitted that the plaintiff did not submit the performance bond pursuant to cl 9.2 of the D contract in the form of a bank guarantee for the sum of RM130,000 to the defendant. This is because both parties have agreed not to have the performance bond, but the defendant shall retain and deduct the same full amount from any amount due or become due until such time when the performance bond is submitted.

E

[13] There is no documentary evidence of any agreement between the plaintiff and the defendant to prove that the defendant had waived the submission of the performance bond by the plaintiff.

F **[14]** Therefore, it cannot be concluded that the performance bond was not required by the defendant by its conduct and acquiescence. Neither can it be contended that the defendant is estopped from raising the issue of the failure of the plaintiff to submit performance bond within the 30 days of signing the contract. Where there is no documentary evidence of a waiver of the G performance bond by the defendant, cll 9.1 and 9.2 of the contract shall operate to bind the parties.

[15] By PW1's own admission, it is clear that no performance bond was H submitted by the plaintiff. It shows that the plaintiff had breached the contract by not complying with the requirement in cl 9.1 of the contract. In such a situation, cl 9.2 then applies. This means that the defendant has the right to retain and deduct the full sum of RM130,000 of the performance bond from any amount due to the plaintiff until the time when the performance bond is I submitted.

Whether the plaintiff's three progress claims Nos 1–3 are to be paid by the defendant

[16] Clauses 11.1, 11.3 and 11.4 of the contract provide as follows:

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11.1	Payment Certificate shall be made monthly, based on works properly executed and 50% of the value of materials on site (excluding formwork materials or any materials for temporary works) to be certified by us, subject to a retention of ten (10) percent of the value of work executed up to a maximum of five (5) percent of the Adjusted Contract Sum.;
11.3	Half of the Retention Sum shall be released after the issuance of Certificate of Practical Completion of the Main Contract and upon the submission and approval or endorsement of as-built drawings, warranty certificate, maintenance and operation manuals and other pertinent documents as stated in the Contract and the balance of the Retention Sum shall be released after the issuance of Certificate of Completion of Making Good Defects of the Main Contract.;
11.4	Period of Honouring of+ Payments shall be Forty Five (45) days from the approval date of Payment Certificate.

[17] The plaintiff's progress claim No 1 dated 26 February 2011 was made before the plaintiff's shop drawings were approved by DBKL's architect on 29 April 2011. However, the plaintiff's progress claims Nos 2 and 3 dated 25 August 2011 and 1 November 2011 respectively (CBOD2 Pt B pp 16–17) were issued by the plaintiff after its shop drawings were approved by DBKL's architect on 29 April 2011.

[18] There is no documentary evidence to show that the defendant, through its correspondence, had communicated to the plaintiff in writing that it was withholding payment for works done because the plaintiff's works were incomplete or the plaintiff submitted its progress claims prematurely (see the minutes of meeting ('MOM') in CBOD2 Pt B pp 34–275, and the defendant's solicitor's letters dated 20 February 2012, 30 March 2012 and 7 December 2012 in CBOD2 Pt B pp 62–63, 64–65 and 32–33 respectively).

[19] That being the case, the terms of payment provided in cl 11 of the contract should therefore apply. Until this civil suit was filed, there is no proof of payment by the defendant to the plaintiff in accordance with cl 11 of the contract. The court holds that the defendant is liable to pay the plaintiff the sum of RM35,966 pursuant to the plaintiff's three progress claims. However, since the plaintiff failed to submit the performance bond, the defendant is entitled under cl 9.2 of the contract to retain and deduct this sum from the full sum of the performance bond until such time when the plaintiff submits the performance bond. In this case, the plaintiff did not submit the performance bond at all. Therefore, the defendant is allowed to retain and deduct the sum of RM35,966. The effect of this finding is that the plaintiff is not allowed to claim this sum as stated in its statement of claim.

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Whether the plaintiff or the defendant breached the contract by its conduct and by the terms of the new LOA

[20] As contended by the defendant, this contract is a fixed sum contract as provided in cl 1.3 of the contract (CBOD1 Pt A p 2):

> 1.3 All prices and rates in this contract are firm and shall not be subjected to any adjustments due to fluctuation in the cost of wages or any expenses payable to workers, fuel, construction plants, materials or goods prices, fees, charges, currency exchanges rates, taxes, import duties or any other duties, expenditure arising out of any change in the legislation or other new laws.

[21] Yet, as can be seen from the plaintiff's new quotation dated 2 November 2011 ('the new quotation') (CBOD4 Pt B pp 463–470), the plaintiff thanked the defendant for 'providing us the opportunity to quote for the above works' and 'submit our competitively priced bills of quantities for your kind consideration' (CBOD4 Pt B p 463). The new quotation is for a contract sum of RM2,914,118 (CBOD4 Pt B p 468).

[22] It is highly probable that what Andy Ng Pei Sing ('DW2'), the chief executive officer of the defendant, said is true, that even though this is a fixed sum contract, the plaintiff was concerned about the price increase of aluminium, as evidenced in the plaintiff's letter to the defendant dated 18 March 2011 (CBOD2 Pt B pp 417e–417g):

> Therefore a written notice from Encik Azizi of Urbanisma Arkitek before 30th March 2011 in accepting the aluminium systems is now a must or else *we shall not be able to undertake the scope of works based on the original contract sum anymore as aluminium price soars. We shall have to request that your company absorbs the aluminium price increase*. ...
>
> Like in the case of aluminium systems, a written notice from Encik Aziz of Urbanisma Arkitek before 7th April 2011 in accepting the accessories/ hardware is therefore a must too. *Otherwise, we shall have to claim for the price increase*. (Emphasis added.)

[23] Subsequently, DBKL rejected the aluminium material known as 'Alucodrand', which was cheaper, and wished to use a material known as 'Alucobond', which was more expensive. That was when the plaintiff gave the new quotation to the defendant.

[24] The defendant contended that the plaintiff applied pressure on it for the new LOA to be drawn up with the new contract sum. The defendant had no choice but to accede to the plaintiff's demand for a new LOA because it had to complete the project for DBKL. What the defendants stated is probably true as

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can be seen from the fact that the new LOA was prepared by the defendant on 2 November 2011 ie on the very same day as the plaintiff's new quotation dated 2 November 2011.

[25] However, the plaintiff alleged that it was the defendant which initiated the new LOA and coerced the plaintiff to execute it. The plaintiff did not execute the new LOA on the ground that the terms of the new LOA were unfavourable to the plaintiff. The plaintiff cited several terms in the new LOA (CBOD1 Pt A pp 43–51) which favoured the defendant instead of the plaintiff, for example:

> **Clause 17**
>
> There were new terms and conditions which shall be read and construed as part of the new LOA;
>
> *Clause 17.1*
>
> The contract sum of the new LOA shall include the following new terms and conditions, inter alia, at no additional cost:
>
> (e) Management Office during the Defects Liability Period, Payment for maintenance service carried out shall be made monthly throughout the Defects Liability Period; and
>
> (f) The terms and conditions of the Contract shall be stipulated in the terms and conditions expressed in Letter of Award and Agreement and Conditions of Sub-Contract works based on drawings and specifications. In event of any inconsistency in any of the terms and conditions stipulated in the Agreement and Conditions of Sub-Contract works shall prevail.

[26] Regarding cl 17.1(e) of the new LOA, the plaintiff objected to maintaining a management office at the project site since it would add to the plaintiff's costs.

[27] Regarding cl 17.1 (I) of the new LOA, the plaintiff objected to the fact that apart from the new LOA, the plaintiff was also to be subjected to a new document ie the agreement and conditions of subcontract works ('the subcontract agreement'), and this subcontract agreement (as in the case of exh D3) contains terms favourable to the defendant, namely:

(a) cl 7 allows the subcontractor to apply for extension of time ('EOT') for the completion of works. However, this is subject to the defendant's approval, which means time becomes at large, and there would no longer be a fixed date from which liquidated damages can run and the plaintiff would lose its right to claim liquidated damages against the defendant; and

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(b) cl 18 where in the event of the main contract between DBKL and the defendant being terminated, the subcontract between the defendant and the plaintiff 'shall be deemed to have terminated automatically'. In such event, the plaintiff, as the subcontractor, shall not be entitled to claim or demand any loss or expenses and/or damage whatsoever either under this contract or by any other right under the common law.

[28] DW2 denied that the terms and conditions of the subcontract agreement applicable to the plaintiff under the new LOA is similar to the one in exh D3 which is actually the agreement executed between the defendant and NL Aluminium. The court finds that there is no documentary evidence to support what the plaintiff contended, that the subcontract agreement referred to in cl 17.1(I) of the new LOA is similar to the one in exh D3. The plaintiff is not a party to exh D3, which is an agreement between the defendant and NL Aluminium.

[29] On the other hand, the defendant contended that the new LOA is favourable to the plaintiff because the contract sum was increased from RM2,600,000 to RM2,914,118. To a certain extent, this is true. However, the court notes that this increase in the contract sum is because DBKL required the new aluminium material, Alucobond, instead of the original material which the plaintiff had contracted for with the defendant at a lower price ie Alucodrand.

[30] Even though the alleged subcontract agreement was not produced as an exhibit, the court finds that the plaintiff was dissatisfied with the terms of the new LOA since it included new terms and conditions in the subcontract agreement which the plaintiff thought was unfavourable to it. The plaintiff therefore did not execute the new LOA with the defendant.

[31] Without the execution of the new LOA, it means that parties would still be bound by the existing contract/the original LOA. However, the plaintiff chose not to continue with the works that it had contracted for with the defendant under the existing contract. This is despite the letters of reminder of the sefendant (see letter dated 29 November 2011 and 15 December 2011 in CBOD2 Pt B pp 19, and 27–28 respectively). In fact, in the defendant's letter dated 15 December 2011, the plaintiff was informed as follows:

> With reference to the above matter, we would like to officially remind you to proceed with the vertical setting works for cladding and curtain wall system at site. *Our site representative has found out that your workers have stopped the works at site since 12th September 2011 until today*.
>
> Thus, we hereby *instruct you to proceed with the vertical setting works for cladding and curtain wall system at site as soon as possible to avoid any delay works at site*. (Emphasis added.)

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[32] It is clear that the plaintiff, by abandoning the works under the contract with the defendant, had breached the contract.

Other alleged breaches of the contract by the plaintiff

[33] The defendant contended that the plaintiff had further breached the contract in the following:

(a) the plaintiff is yet to complete the work stated in their progressive claims. The defendant had on numerous occasions requested the plaintiff to submit or re-submit the mock up samples and submit its vertical report and information for tower section details, which are all part of the preliminaries work but the plaintiff failed to do so despite numerous reminders by the defendant (see the defendant's letters dated 28 July 2011, 21 October 2011, and 15 December 2011 in CBOD2 Pt B pp 9, 15 and 28 respectively and cl 19.3 of the original LOA);

(b) the plaintiff failed to submit its detailed construction programme within the stipulated time;

(c) the court finds this to be true. According to cl 6.2 of the contract/original LOA (CBOD1 Pt A p 4), the plaintiff was required to submit its detailed construction programme within seven days from the date of the original LOA dated 2 July 2010. However, the plaintiff only submitted the same more than five months after the date of the original LOA ie on 14 December 2010, and its revised construction programme on 8 March 2011 (see the plaintiff's letters dated 14 December 2010 and 8 March 2011 in CBOD2 Pt B pp 417j–417k and pp 417h–417 respectively);

(d) the plaintiff failed to attend most site meetings even though the plaintiff was invited to attend all site meetings by the defendant, and the plaintiff was duty bound to attend all such meetings. The plaintiff admitted not attending the site meetings at the initial stage for the reason that their scope of works had not commenced. The plaintiff also failed to attend site meetings Nos 28 and 35 even though DW2 did not make it an issue during his cross-examination; and

(e) the plaintiff further failed to send its staff to work at the project site since 12 September 2011. The minutes of meetings ('MOM') recorded by the defendant, in particular at pp 227, 237, 244, 245, 251 and 259 (in CBOD2 Pt B pp 34–275) show that the plaintiff did not commence work despite it stating in the meeting that they would commence work after Hari Raya on 8 September 2011. There is no evidence adduced by the plaintiff that it did continue with the works since 8 September 2011, or after 30 September 2011, until completion of the works.

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[34] From the above, it is clear that the plaintiff did not fulfil most of its obligations under the contract. The plaintiff therefore was in breach of the contract.

Other alleged breaches of the contract by the defendant

Delay by Biaxis (M) Sdn Bhd ('Biaxis')

[35] The defendant did not rebut the plaintiffs evidence that the plaintiff, as a specialist in the works under the contract, could commence work only after about six to nine floors of the building had been completed.

[36] Biaxis, which is the subcontractor in charge of structural works in the project, was slow in its work progress and was behind schedule for a continuous period of nearly eight months commencing from 5 April 2011 (see MOM No 21 in CBOD2 Pt B pp 95–99) until 15 November 2011 (see MOM No 35 in CBOD2 Pt B pp 241–245).

[37] There is no evidence that during that period, the defendant came up with a contingency plan to mitigate the delays affecting the whole project, including the plaintiff's works.

[38] As pointed by counsel for the plaintiff, the MOM No 32 dated 27 September 2011 (CBOD2 Pt B pp 215–220), recorded that the slab and beam at level 9A would only be casted on 30 Septeber 2011. This means that the ninth floor of the building would only be ready by the end of September 2011. Therefore, the plaintiff, since obtaining DBKL's approval for the shop drawings on 29 April 2011, was prevented from carrying out its construction works until 30 September 2011.

DBKL's proposed variations

[39] It is the defendant's own evidence that any delays affecting the project were due to DBKL's decision to, inter alia, vary the design of the project by adding 19 units of stalls, changing the use of office space to bazaar space, and increasing the number of floors from 15 to 16 storeys. By the extension of time ('EOT') Certificate No 1 dated 5 January 2012 ('the EOT certificate') (CBOD1 Pt A pp 52–53), DBKL granted the defendant an EOT of 248 days to complete the works in respect of the project and the date of completion was extended from 26 February 2012 to 31 October 2012. The defendant alleged that had the plaintiff attended the site meetings, the plaintiff would have been aware of the development in the project.

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[40] The court notes that the EOT certificate of DBKL which allowed the EOT to the defendant for works which have been delayed stated the following reasons for EOT being given (see CBOD1 Pt A p 52):

(a) to carry out additional works to the design of the building, by adding 19 units of stalls, change of use of office space to space for bazaar and kiosk, and adding one more floor from 15 storeys to 16 storeys.

(b) delay in getting approval to the application for special permission to start work.

(c) confirmation of the site boundary which involved setting out work for preparation of the 'Pre-Comp Plan'.

(d) finding holes, rocks and tree stumps and roots while digging the ground for sub-structure works.

[41] Nowhere in the EOT certificate is it stated that the defendant's work was delayed by Biaxis, or by the plaintiff's subcontract works. This means that as on the date of DBKL's EOT certificate, on 5 January 2012, despite the delay by Biaxis to construct up to the 6–9 floors required by the plaintiff before the plaintiff could start its work, the defendant (and therefore the plaintiff included) could continue with the works that the defendant and the plaintiff had respectively contracted for, given the EOT.

[42] However, the plaintiff had, before 5 January 2012, decided not to continue with its obligations under the contract, and had abandoned the works after September 2011.

Safety catchment platform

[43] The plaintiff alleged that the defendant did not fulfil its obligation to provide a safety catchment platform ('the platform') to enable the plaintiff to carry out its works. The platform is to protect the plaintiff's workers from being injured by cement and other debris falling from the higher floors, where other workers of other subcontractors were working, to the lower floors, where the plaintiff's workers were working.

[44] As a result of the defendant's failure to provide the platform, the plaintiff's progress of work was interrupted and it could only carry out its scope of the works slowly due to the debris falling from the higher floors.

[45] The defendant could not show any photographs or other documents to prove that it had provided the platform for the plaintiff.

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[46] Mohd Adib bin Rusli ('PW1'), the plaintiff's site supervisor, alleged that he had raised the plaintiff's request for the platform in the site meetings Nos 33 and 34. However, this was not recorded in the MOM. The plaintiff contended that the defendant never gave the subcontractors an opportunity to verify the contents of the MOM and the contents were always skewed in favour of the defendant. On the other hand, there is no proof that the plaintiff wrote to the defendant stating its objection that the defendant failed to provide the platform.

[47] The court tends to agree with the submission of counsel for the defendant that the defendant was required to comply with all the requirements of the Department of Safety and Health ('the JKKP'), including providing the platform. Otherwise, the defendant would not be allowed to commence the works for the project. To date, the JKKP has not taken any action against the defendant for non-compliance with its safety requirements. It can be inferred and concluded that the defendant did provide the platform, contrary to what the plaintiff alleged.

[48] In any case, it is to be noted that the plaintiff did not plead the issue of the defendant's failure to provide the platform. It is trite law that a party is bound by its pleadings (see Federal Court decision in *Menah Sulong v Lim Soo & Anor* [1983] CLJ (Rep) 263, and Court of Appeal decision in *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750). The plaintiff should not be allowed to raise this alleged failure of the defendant to provide the platform as an issue during the trial.

Master work programme

[49] Pursuant to cl 5 of the contract, the commencement date of the original LOA shall be 2 July 2010 and the completion date shall follow the 'Main Contractor's Construction Programme' or the master work programme for the project.

[50] The plaintiff alleged that the defendant never forwarded an accurate or relevant master work programme to the plaintiff. There is no evidence that the defendant had done so.

[51] The master work programme was also not exhibited in court by the defendant. This was admitted by Syamrin bin Bahsan ('DW1'), the defendant's director.

[52] By its letters dated 14 December 2010 and 8 March 2011 (CBOD2 Pt B pp 417 j–k and 417 h–i respectively), which enclosed the plaintiff's work

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programmes, the plaintiff informed the defendant that it did not have any master work programme. This was not rebutted by the defendant.

[53] Counsel for the defendant submitted that if the master work programme was not distributed to the plaintiff, it was not possible that the plaintiff was able to prepare its work programme and submitted the same to the defendant via its letters dated 14 December 2010 (CBOD2 Pt B pp 417 j–k) and 8 March 2011 (CBOD2 Pt B pp 417 h–i) respectively. However, the court notes that in the MOM No 18 dated 22 February 2011 (CBOD2 Pt B pp 74–79), it is recorded that the plaintiff requested from the defendant the master work programme. Thus, it is not probable that the plaintiff had been given such programme by the defendant.

[54] By an email dated 26 February 2011 from the plaintiff to the defendant (CBOD2 Pt B p 417 c-d), the plaintiff stated, inter alia, that it could not complete the schedule for material submission because the plaintiff did not have the latest work programme.

[55] By a letter dated 18 March 2011 from the plaintiff to the defendant (CBOD2 Pt B p 417 e–g), the plaintiff requested for the latest revised master work programme because the old programme, which stated the completion date as March 2011, was inapplicable and invalid due to the slow progress on site.

[56] From the above letters of the plaintiff, it is highly probable that the defendant did not give the plaintiff the master work programme, or a revised version of it, even though requested several times by the plaintiff.

[57] On the other hand, the defendant contended that the master work programme was made available during its site meeting and displayed on the notice board of the site office of the project. This is highly improbable because, had the master work programme been available, the plaintiff would not have repeatedly requested for it from the defendant.

[58] As contended by the plaintiff, the defendant's failure to forward the master work programme to the plaintiff is a serious breach of the contract/original LOA because the plaintiff would not know the construction period and the date of completion of the project. This would impair the plaintiff's ability to perform its obligations thereunder.

[59] Counsel for the plaintiff submitted that dw1 does not have the proper qualification to be a project manager for the project. DW1 has a Diploma in Marketing from Institut Teknologi Tun Abdul Razak. DW1 could not

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remember where he worked after passing with his diploma. Sometime after that, DW1 worked for Telekom, and later the defendant.

[60] Counsel for the plaintiff further submitted that DW1 was not experienced in the construction industry and failed to carry out his obligations as a project manager properly to ensure that the construction works were carried out in accordance with the time frame stipulated in the contract.

[61] The court does not find any concrete evidence adduced by the plaintiff to show that it is due to DW1's alleged incompetence that had delayed the project and caused the defendant to breach the contract with the plaintiff.

The defendant's failure to give possession of the project site to the plaintiff to carry out its works

[62] There is no cogent proof adduced by the defendant that the plaintiff demanded to be given exclusive possession of the project site. Therefore, this allegation by the defendant against the plaintiff is baseless. It is clear from cl 13.3 of the contract that, the plaintiff was 'required to work in close coordination with other trade sub-contractors and allow for the commencement of works for these trades if required and to facilitate the sequence of work by other trade sub-contractors'.

[63] Conversely, the plaintiff failed to prove that the defendant did not give the plaintiff possession of the site within the prescribed time under the contract. Neither did the plaintiff succeed in proving its claim that the defendant obstructed, prevented and/or hindered the plaintiff from carrying out the whole of the remaining works under the contract.

The court's finding on who breached the contract

[64] From totality of the evidence adduced, the court finds that while the defendant had failed to supply the plaintiff with the requisite master work programme, which is in breach of the defendant's obligations under the contract, the plaintiff was even more blameworthy for abandoning the works and the contract, and leaving the defendant in the lurch.

Whether the plaintiff's claim can be allowed

[65] In view of the various serious breaches of the contract by the plaintiff, the plaintiff is not entitled to sums claimed in the statement of claim.

[66] Regarding the claim for loss of anticipated profits, this claim is without basis. Nowhere in the contract is it provided that the plaintiff was not allowed

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to tender for and work in other projects. PW2 admitted this in his cross-examination. The plaintiff also failed to prove how this claim for RM520,000 was calculated or derived at. No independent witness was called to support the claim for loss of anticipated profits.

Whether the defendant's counterclaim can be allowed

[67] In view of the defendant's breach of the contract by failing to provide the plaintiff with the master work programme, and for including new and unfavourable terms to the new LOA and subcontract agreement which made it impossible for the plaintiff to carry on with the works, the defendant is not entitled to its counterclaim.

[68] The law regarding the consequences for breach of contract and the quantum of damages is provided in s 74 of the Contracts Act 1950 . It is also trite law that a party claiming for damages must prove actual loss or damage (see Court of Appeal decisions in *Government of the State of Sabah v Suwiri Sdn Bhd* [2006] 1 MLJ 359 and *Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1).

[69] In this case, the defendant was unable to show proof of its payment of RM800,000 pursuant to the contract that it had entered into with NL Aluminium ie for additional costs, even though it exhibited its LOA/contract with NL Aluminium in exh D3.

[70] As for the defendant's counterclaim for loss of profit, there is no evidence adduced by the defendant to support this claim.

[71] Regarding the defendant's counterclaim for late interest imposed by DBKL on the defendant at a rate of RM8,500 per day under cl 40 of the main contract (CBOD4 Pt B pp 418–462, at p 447), the court is of the view that this was wrongly pleaded by the defendant. The defendant should have pleaded a claim for liquidated and ascertained damages ('LAD'), as stated in cl 40 of the main contract between DBKL and the defendant, and not late interest. As I had stated earlier, a party is bound by its pleadings. Thus, by pleading a claim for only late interest, and not LAD, the defendant's counterclaim for this head cannot be allowed. In any case, there is no proof that the defendant had paid DBKL the alleged late interest.

[72] DW2 admitted that finally DBKL terminated the main contract with the defendant on 17 December 2012 (CBOD4 Pt B pp 481–484) for delay in completing the project.

[73] The plaintiff's abandonment of its works could have contributed to the

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defendant's delay in completing the project for DBKL. However, the obligation is on the defendant to pay DBKL the LAD under the main contract. There is no cogent evidence that it was solely because of the plaintiff's abandonment of the works that the defendant had to pay the LAD and was finally terminated from the main contract on 17 December 2012.

[74] It must be borne in mind that there were several subcontractors involved in the project, including Biaxis which delayed the project by nearly eight months. NL Aluminium was already appointed by the defendant on 16 April 2012 (see exh D3) to complete the works abandoned by the plaintiff. Thus, from 16 April 2012 to the date of termination of the main contract on 17 December 2012 by DBKL, NL Aluminium was responsible for the works under exh D3. DBKL's letter of termination did not state specifically that the delay by the defendant to complete the project was due to the non-completion of the scope of works covered by the plaintiff's contract with the defendant.

DECISION

[75] Based on the above considerations, on a balance of probabilities, the court holds that:

(a) the plaintiff has failed to prove its claim against the defendant. Accordingly, the plaintiff's claim is dismissed with costs of RM15,000 to be paid to the defendant; and

(b) the defendant has failed to prove its counterclaim against the plaintiff. Accordingly, the defendant's counterclaim is dismissed with costs of RM15,000 to be paid to the plaintiff.

Claim and counterclaim dismissed with costs of RM15,000.

Reported by Afiq Mohamad Noor